

³ The Board notes that following the June 23, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to modify OWCP's September 28, 2018 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 1, 2013 appellant, then a 46-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on September 25, 2013 he injured his cervical spine when participating in a mandatory high intensity interval training while in the performance of duty. OWCP accepted the claim for a cervical strain. On August 6, 2014 it expanded the acceptance of the claim to include cervical disc herniation at C6-7. Appellant stopped work on August 6, 2014 and OWCP paid him wage-loss compensation for disability from work on the supplemental rolls. He sought treatment for his conditions with Dr. Jason Thompson, a Board-certified orthopedic surgeon. On August 26, 2014 appellant underwent OWCP-authorized surgery for a C6-7 cervical disc arthroplasty. Commencing October 11, 2014 OWCP paid appellant wage-loss compensation on the periodic rolls.

In a January 29, 2015 report, Dr. Thompson discussed appellant's status post C6-7 disc arthroplasty. He opined that appellant could return to work in the public sector as he had no restrictions on lifting, bending, twisting, or exercising. However, Dr. Thompson found that appellant could not return to a law enforcement position where the potential for unexpected physical violence to the head and neck could be anticipated.

On February 3, 2015 OWCP referred appellant to Dr. Louis Kretschmer, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a February 17, 2015 narrative report, Dr. Kretschmer indicated that, although, appellant did not have any specific restrictions, he would not be able to return to work as a federal air marshal as it would be unsafe for him to participate in vigorous physical confrontation with fellow employees during training or aggressive passengers on an airplane. He indicated that appellant would be an excellent candidate for vocational rehabilitation. In an accompanying February 17, 2015 work capacity evaluation (Form OWCP-5c), Dr. Kretschmer determined that appellant's restrictions were permanent and that appellant was capable of performing sedentary-, light-, and medium-duty work.

On March 19, 2015 OWCP referred appellant for vocational rehabilitation to find a suitable position within the restrictions provided by Dr. Kretschmer on February 17, 2015. On June 15, 2015 appellant submitted a change of address and notified OWCP that he was relocating from Maple Valley, Washington to Chandler, Arizona. From September 8, 2015 through February 11, 2016, appellant underwent training to become a Certified Protection Professional (CPP). After obtaining his CPP certification, he worked with his vocational rehabilitation counselor for job placement. Beginning August 9, 2016 appellant sought treatment with Dr. Steven Berman, a treating physician.

⁴ Docket No. 19-1410 (issued November 5, 2020).

In a September 29, 2016 memorandum, appellant's vocational rehabilitation counselor noted that the position of internal security manager was vocationally suitable for appellant. She found that the position remained medically suitable as the duties were within appellant's work limitations and the position was available in sufficient numbers within appellant's commuting area based on an August 29, 2016 labor market survey. The vocational rehabilitation counselor reported that appellant would expect to earn the average wage of \$19.45 per hour due to his prior experience and his recently acquired CPP industry certification.

On December 7, 2016 appellant submitted another change of address and notified OWCP that he was relocating from Chandler, Arizona to Sparks, Nevada.

On December 7, 2017 OWCP requested that appellant's treating physician evaluate his functional capabilities by completing a Form OWCP-5c. On a December 12, 2017 Form OWCP-5c, Dr. Berman reported that appellant had reached maximum medical improvement (MMI) and his restrictions remained unchanged. He reported that appellant could perform sedentary-, light-, and medium-duty work.

On February 2, 2018 OWCP asked appellant's vocational rehabilitation counselor to perform a labor market survey for the purpose of determining if the internal security manager position was available in appellant's new job market of Sparks, Nevada. On March 28, 2018 the counselor confirmed that the internal security manager job still met appellant's criteria based on the March 23, 2018 labor market survey. She reported that appellant was capable of working as an internal security manager and that labor market surveys showed that the position was reasonably available in his commuting area of Sparks, Nevada. The Department of Labor, *Dictionary of Occupational Titles* (DOT) describes the internal security manager position (DOT #378.137-0102) as involving supervision and coordination of activities of store detectives, conducting private investigations, and selling internal protective service to wholesale and retail businesses. The position required assigning store detectives to shifts at various locations according to job requirements and workers' abilities, skills, and experience. The DOT, on a job classification report (Form OWCP-66), described the physical requirements of the position as light work to include exerting up to 20 pounds of force occasionally. The counselor reported that the salary for this position ranged from \$18.00 to \$23.00 per hour based on the labor market survey. She recommended the average wage of \$20.50 per hour based on appellant's previous experience performing this position and his recently acquired CPP industry certification.

In a letter dated July 9, 2018, Dr. Berman verified that appellant had reached MMI and was capable of working full time with the restrictions that had been in place since 2014. He reported that appellant was in a permanent stationary status and there were no significant changes to his condition since the last visit. Dr. Berman found that there were no changes in his work status or the recommended work restrictions.

On August 23, 2018 OWCP notified appellant that it proposed to reduce his wage-loss compensation pursuant to 5 U.S.C. §§ 8106 and 8115. It advised him that he was only partially disabled from work and that the position of internal security manager (DOT #378.137-0102) was medically and vocationally suitable with regard to his medical limitations, work experience, and education. OWCP explained that the physical requirements of the internal security manager did not exceed the restrictions imposed by Dr. Berman's December 12, 2017 and July 9, 2018 reports. It found that appellant was capable of earning wages at the rate of \$820.00 per week as an internal security manager and that the position was reasonably available within his commuting area. OWCP provided an attachment detailing the application of the formula set forth in *Albert C.*

Shadrick.⁵ It afforded appellant 30 days to submit evidence and argument challenging the proposed action.

In a September 9, 2018 letter, counsel disagreed with the proposed reduction of compensation. He argued that the job analysis was improper because it was based on appellant's prior residence in Seattle, Washington. Counsel asserted that the job availability and wage rate should have been based on the job market for Sparks, Nevada, where appellant currently resided. He further argued that the job availability and hourly wage was likely far less in Sparks, Nevada and requested a new labor market survey.

By decision dated September 28, 2018, OWCP reduced appellant's wage-loss compensation benefits, effective September 30, 2018, based on his ability to earn wages of \$820.00 per week as an internal security manager. It verified that the March 23, 2018 labor market study, was conducted for his commuting area in and around Reno, Nevada and not Seattle, Washington as asserted by counsel for appellant. OWCP explained that the physical duties of the position were in accordance with the restrictions provided by Dr. Berman's July 9, 2018 report, and that appellant's rehabilitation counselor had determined that he was vocationally capable of performing the constructed position. It further found that appellant was no longer totally disabled from work and that the position of internal security manager was medically and vocationally suitable, and represented his wage-earning capacity. OWCP applied the *Shadrick*⁶ formula to determine appellant's LWEC and adjust his compensation.

On October 9, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on January 25, 2019, appellant testified that he was unable to accept most of the jobs in the labor market study due to other conditions.

By decision dated March 29, 2019, OWCP's hearing representative affirmed the September 28, 2018 decision. She concluded that the position of internal security manager reasonably and accurately reflected his wage-earning capacity and his compensation was properly reduced effective September 30, 2018.

Appellant appealed to the Board and, by decision dated November 5, 2020,⁷ the Board affirmed OWCP's March 29, 2019 decision.

On December 7, 2020 appellant, through counsel, requested modification of OWCP's September 28, 2018 LWEC determination. He submitted an October 20, 2020 report from Dr. Paul Fry, a Board-certified orthopedic surgeon serving as an OWCP referral physician, who advised that, during a September 22, 2020 physical examination, appellant had examination findings of "a diminished cervical range of motion." Dr. Fry noted that appellant's clinical examination showed that all measurements of his cervical range of motion were symmetrical on the right and left. He indicated that range of motion measurements of the shoulders were optimal and symmetrical, and that bilateral upper extremity strength measurements were optimal at 5/5. Dr. Fry opined that appellant had residuals of his work injury resulting from cervical disc surgery and indicated that he was unable to perform the duties of his date-of-injury position as a federal

⁵ 5 ECAB 376 (1953).

⁶ *Id.*

⁷ *Supra* note 4.

air marshal. He completed a Form OWCP-5c confirming appellant's ability to work full time with restrictions, including lifting no more than 25 pounds intermittently.

In a January 13, 2021 report, Dr. Berman noted appellant's subjective complaints of dull aching, throbbing, squeezing, and cramping, but noted that as to the head and neck he had "full range of motion, no abnormal findings." He also indicated that appellant had no neurological abnormalities and that he had normal strength and flexion of the bilateral upper extremities. Dr. Berman advised that the musculature of appellant's neck was noted to be of "normal strength and tone." He indicated that he would refer appellant for x-ray testing to determine if there had been any changes in his cervical spine.

Appellant also submitted an x-ray report of his cervical spine, obtained on February 1, 2021, which contained an impression of status post artificial disc replacement at C6-7 without evidence of dynamic instability, as well as mild straightening of cervical lordosis in neutral position.

By decision dated June 23, 2021, OWCP determined that appellant has not met his burden of proof to modify OWCP's September 28, 2018 LWEC determination. It found that the evidence submitted by appellant on reconsideration did not show that his injury-related condition prevented him from working as an internal security manager.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.⁸ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed based on his or her LWEC.⁹ An employee's actual earnings generally best reflect his or her wage-earning capacity.¹⁰ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.¹¹ But if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.¹²

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.¹³ The medical evidence OWCP relies upon must provide a detailed description of the employee's

⁸ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁹ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹⁰ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹¹ *Id.*

¹² 5 U.S.C. § 8115(a); *MaryJo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹³ *M.A.*, 59 ECAB 624, 631 (2008).

condition and the evaluation must be reasonably current.¹⁴ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to post-injury or subsequently acquired conditions.¹⁵

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) or otherwise available in the open labor market that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.¹⁶ Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.¹⁷ Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.¹⁸

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.¹⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify OWCP's September 28, 2018 LWEC determination.

By decision dated November 5, 2020,²¹ the Board affirmed OWCP's March 29, 2019 decision, finding the September 28, 2018 LWEC determination was proper. Findings made in

¹⁴ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

¹⁵ *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4c (June 2013).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

¹⁷ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6 (June 2013).

¹⁸ 20 C.F.R. § 10.403(d); *see also Albert C. Shadrick*, *supra* note 5.

¹⁹ *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

²⁰ *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

²¹ *Supra* note 4.

prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.²²

The Board finds that appellant has not shown that modification of the September 28, 2018 LWEC determination is warranted by establishing that a spontaneous worsening of his injury-related condition after the issuance of the September 28, 2018 LWEC determination prevented him from working as an internal security manager.²³

Appellant submitted an October 20, 2020 report from Dr. Fry, an OWCP referral physician, who advised that, during a September 22, 2020 physical examination, appellant had examination findings of “a diminished cervical range of motion.” He further discussed appellant’s examination findings and opined that appellant had residuals of his work injury which prevented him from performing the duties of his date-of-injury position as a federal air marshal. Dr. Fry completed a Form OWCP-5c confirming appellant’s ability to work full time with restrictions, including lifting no more than 25 pounds intermittently. In a January 13, 2021 report, Dr. Berman noted appellant’s subjective complaints of dull aching, throbbing, squeezing, and cramping, but indicated that as to the head and neck he had “full range of motion, no abnormal findings.” He also noted that appellant had no neurological abnormalities and that he had normal strength and flexion of the bilateral upper extremities. Dr. Berman advised that the musculature of appellant’s neck was noted to be of “normal strength and tone.” Appellant also submitted an x-ray report of his cervical spine, obtained on February 1, 2021, which contained an impression of status post artificial disc replacement at C6-7 without evidence of dynamic instability, as well as mild straightening of cervical lordosis in neutral position.

The Board finds that the submitted reports of Dr. Fry and Dr. Berman, as well as the diagnostic testing report, are of no probative value in showing that a worsening of appellant’s injury-related condition prevented appellant from working as an internal security manager, *i.e.*, the position that served as the basis for the September 28, 2018 LWEC determination. These reports do not provide an opinion that appellant was unable to work as an internal security manager. Dr. Fry’s report contains restrictions that would allow him to work in the position. The Board has held that medical evidence that does not offer an opinion regarding a given medical matter, such as the inability to perform a given position, is of no probative value on that matter.²⁴ Therefore, these reports are insufficient to establish appellant’s request for modification of the September 28, 2018 LWEC determination.

The Board further finds that appellant has not shown that modification of the September 28, 2018 LWEC determination is warranted by establishing that he was subsequently retrained or otherwise vocationally rehabilitated.²⁵ Therefore, appellant has not met any of the three prongs of the standards for modifying an LWEC determination.

²² *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *B.W.*, Docket No. 17-0366 (issued June 7, 2017); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

²³ *Id.*

²⁴ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²⁵ *See supra* note 19.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met his burden of proof to modify OWCP's September 28, 2018 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 30, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board